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IN THE
COURT OF APPEALS OF INDIANA

TODD EUGENE TRUMANN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0608-CR-423
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable George W. Biddlecome, Judge
Cause No. 20D03-0004-CF-38

April 27, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Todd E. Trumann pleaded guilty but mentally ill to Voluntary Manslaughter,[1] a class A felony, and challenges the sentence imposed thereon on multiple grounds.[2] The State cross-appeals, raising the following dispositive, restated issue: Did the trial court erroneously grant Trumann's petition for permission to file a belated notice of appeal?

We reverse.

In April 2000, the State charged Trumann with battery resulting in serious bodily injury as a class C felony, but the charge was later amended to murder, a felony, after William R. Kellems, the victim, died from his injuries. The State further alleged that Trumann was a habitual offender. On June 29, 2000, Trumann filed a notice of intent to interpose an insanity defense and a motion to determine competency. The following day, the trial court appointed Gary Seltman and Carl Rutt, both psychiatrists, to examine Trumann in order to determine his competency to stand trial. Drs. Seltman and Rutt separately concluded that Trumann was competent to stand trial.

Thereafter, the trial court permitted Trumann to retain Dennis Olvera, Ph.D., for the purpose of administering additional psychological and cognitive tests in order to determine Trumann's competency to stand trial. Olvera diagnosed Trumann with mild mental retardation (defined as an I.Q. of between 70-75), and major depression with psychotic features defined by self-deprecating and command auditory hallucinations (Trumann stated the devil told him to commit suicide). Based upon his evaluation,

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[1] Ind. Code Ann. § 35-42-1-3 (West 2000).

[2] Specifically, Trumann contends: (1) the trial court imposed a sentence that contravenes the terms of his plea agreement; (2) the trial court improperly weighed the mitigating and aggravating circumstances; and (3) his sentence was inappropriate.

Olvera concluded Trumann was not competent to stand trial because he did not possess the intellectual or behavioral ability to do so. The trial court ultimately determined Trumann was competent to stand trial.

On April 11, 2002, Trumann filed a motion to withdraw his plea of not guilty and enter a plea of guilty to voluntary manslaughter as a class A felony. A hearing was held on May 30, 2002, at which the trial court accepted the guilty plea and imposed a fifty-year sentence, but suspended twenty years to reporting probation. On June 13, 2002, Trumann filed a motion to correct erroneous sentence, which the trial court denied.

On May 29, 2003, Trumann, *pro se*, filed a "motion for modification of sentence[.]" *Appellant's Appendix* at 160. Along with this motion, Trumann filed a motion for evaluation, which was granted. The trial court, however, denied Trumann's motion for sentence modification. We note the motions are coherent, do not indicate they were prepared by someone other than Trumann, and Trumann's signature appears on the last page attached to the motions. On August 21, 2003, Trumann, *pro se*, filed a motion to obtain the transcripts of the guilty plea and sentencing hearings and an affidavit of poverty.

On September 12, 2003, Trumann sent a handwritten letter to the Elkhart County Clerk requesting a chronological case summary because he was "in the process of filing [his] post-conviction relief petition . . . ." *Id.* at 182. Again, the letter is coherent, does not indicate it was prepared by anyone other than Trumann, and Trumann's signature appears at the bottom of the letter. On February 16, 2004, Trumann sent a handwritten letter to Elkhart Superior Court No. 3 requesting that it modify his sentence because he

"ha[d] a clean conduct history and fel[t] he [was] ready to be re-integrated into society." *Id.* at 183. This letter, too, is coherent, does not indicate it was authored by anyone other than Trumann, and Trumann's signature appears at the bottom of the letter.

On August 11, 2004, Trumann sent another handwritten letter to Elkhart Superior Court 3, this one requesting credit for pre-sentence time served in prison. This letter is coherent and does not indicate it was prepared by anyone other than Trumann. On August 19, 2004, Trumann sent another handwritten letter to Elkhart Superior Court 3. The letter stated:

> Dear sir/madam,
>
> I am writing in regards to the "Freedom of Information Act" enacted by Congress. I was convicted in Elkhart County, Indiana and, due to lack of the necessary funds, could not afford an attorney to "properly" defend me.
>
> I am requesting all documentation regarding the conviction so that I may work to properly prepare my defense and secure my release. This request cannot be denied unless any of the seven requirements for exemption are met.
>
> I am waiving any fees involved as I am indegent [sic] and ward [sic] of the state.
>
> The documentation/information that is needed to be furnished are [sic] as follows:
>
> 1) All charging information (indictment, statements, etc.)
>
> 2) All sentencing information
>
> 3) Any other documentation related to the conviction.
>
> The cause number is 20 D03 0004 CF 38

> I sincerely wish to thank you, sir/madam, for your time and effort(s) in the furnishing of all documentation in the said cause.
>
> Respectfully
> Submitted,
> /s Todd Trumann

Id. at 191-92.

On August 23, 2004, Trumann, *pro se*, filed a petition for jail time credit. This petition is coherent, signed by Trumann, and bears no indication it was prepared by anyone other than Trumann. On September 1, 2004, the trial court issued an order in which it concluded Trumann was awarded all credit time to which he was entitled. On February 24, 2005, Trumann, *pro se*, filed a motion for transcripts of guilty plea and sentencing hearings and an affidavit of poverty. On September 6, 2005, Trumann, *pro se*, filed a petition for sentence modification and a motion for transport. That same day, the trial court denied Trumann's petition for sentence modification.

On February 22, 2006, Trumann, *pro se*, filed a petition for permission to file a belated appeal. The trial court scheduled a hearing for April 27, 2006. On March 22, 2006, Trumann sent a handwritten letter to the trial court requesting appointment of counsel. Again, this letter was coherent, bore no indication of preparation by anyone other than Trumann, and contained Trumann's signature. Following a hearing, the trial court appointed counsel to represent Trumann. On May 19, 2006, Trumann, by counsel, submitted a motion for permission to file a belated notice of appeal. The motion, in relevant part, states:

> This motion is made on behalf of . . . Trumann under PC2(1), "Belated Notice of Appeal", on the grounds set forth below . . . .

> 5. . . . [Trumann] had insufficient knowledge of and inability to understand the criminal justice system and appellate procedure. Without counsel, any failure to competently file a timely notice of appeal should not be considered the fault of [] Trumann.
>
> 6. [Trumann] has been diligent in pursuing his appellate rights.

Id. at 216. On May 30, 2006, without a hearing, the trial court granted Trumann's motion to file a belated appeal. Trumann appeals and the State cross-appeals. Further facts will be included as necessary.

The State contends the trial court improperly granted Trumann's petition for permission to file a belated notice of appeal. Trumann responds the trial court properly granted his petition because he was not advised of his right to a direct appeal, he has "limited mental acuity" and difficulty understanding the law, he is unfamiliar with the legal system, and there was an uncertainty in the law.[3] *Cross-Appellee's Brief* at 5.

The trial court's decision to grant or deny a defendant's petition to file a belated notice of appeal is generally a matter entrusted to its sound discretion. *Beatty v. State*, 854 N.E.2d 406 (Ind. Ct. App. 2006). Where, however, the trial court did not conduct a hearing on the motion and the allegations contained in the motion itself provide the only basis in support thereof, we review the trial court's decision *de novo*. *George v. State*,

[3] Trumann also argues the State has waived this argument because it failed to object to his petition. At the hearing on Trumann's *pro se* petition to file a belated notice of appeal, the trial court directed Trumann to file a motion by counsel. Trumann so filed, but no hearing was held on the motion. Rather, the trial court simply granted Trumann's motion by incorporating the averments made by Trumann in the motion. Under these circumstances, we cannot conclude the State has waived this argument. *See Beatty v. State*, 854 N.E.2d 406 (issue not waived where hearing was held before time expired for State to file a written objection).

No. 49A04-0511-CR-673, ___ N.E.2d ___, 2006 WL 4041903 (Ind. Ct. App. Oct. 31, 2006).

A petition for permission to file a belated notice of appeal may be granted where the defendant was: (1) without fault for failing to file a timely notice of appeal; and (2) diligent in requesting permission to file the belated notice of appeal. *Beatty v. State*, 854 N.E.2d 406; Ind. Post-Conviction Rule 2(1). The defendant bears the burden of proving both of these requirements by a preponderance of the evidence. *Beatty v. State*, 854 N.E.2d 406. P-C.R. 2(1) requires the trial court to consider these two factors in deciding whether to grant or deny a petition to file a belated notice of appeal, and provides that the trial court must grant the petition where it finds the defendant has established the two factors. *Beatty v. State*, 854 N.E.2d 406; P-C.R. 2(1).

The trial court did not conduct a hearing on Trumann's motion and, therefore, we review the trial court's grant *de novo*. *George v. State*, 2006 WL 4041903. Although there are no set standards defining delay and each case must be decided on its own facts, factors affecting the determination of whether a defendant was without fault in the delay of filing the notice of appeal include, among others, the defendant's level of awareness of his procedural remedy, familiarity with the legal system, whether he was informed of his appellate rights, and whether he committed an act or omission that contributed to the delay. *Baysinger v. State*, 835 N.E.2d 223 (Ind. Ct. App. 2005).

We first consider Trumann's level of awareness of his procedural remedies. Olvera diagnosed Trumann with mild mental retardation, which "puts him at a level where he is as intellectually and as behaviorally able as no more than 2 to 3 percent of the

adult population." *Transcript* at 91. At first blush, Trumann's diminished intellectual capacity suggests he may not have been fully aware of, or able to comprehend, the legal process.

This supposition, however, is counterbalanced by the numerous motions, petitions, and letters Trumann sent the trial court following his sentencing, including four *pro se* motions, two *pro se* petitions, and four handwritten letters, all of which were coherent and signed by Trumann. Worthy of special consideration are a handwritten letter sent by Trumann to the trial court on September 12, 2003, in which Trumann stated he was "in the process of filing [his] post-conviction relief petition . . . [,]" *Appellant's Appendix* at 182, and the P-C.R. 2(1) petition Trumann filed *pro se* on February 2006. These filings and correspondences indicate Trumann was aware of and had access to procedural remedies. Further, the PSI indicates Trumann has a lengthy criminal history dating back to 1983, including nine arrests, one juvenile true finding, four convictions, and one stint in prison. Trumann's criminal history strongly suggests a familiarity with the legal system.

We also note there is evidence in the record to support the State's claim that Trumann deliberately sought to exaggerate the extent of his incapacitation. For example, when asked by Dr. Seltman in September 2000 regarding what the State charged him with, Trumann "responded Murder, a correct response." *Transcript* at 146. When asked the same question by Olvera in September 2001, Trumann responded, "I got into a fight at home." *Appellant's Appendix* at 139. This is but one example. When asked by Dr. Seltman in September 2000 what the possible consequence of conviction might be,

Trumann responded "that he could face an extended period of incarceration[,] which [wa]s an accurate statement." *Transcript* at 146. Conversely, when Trumann was interviewed by Olvera in September 2001, Olvera "didn't even ask [Trumann] what period of incarceration he could expect because he was not even . . . conversant with the severity of the crime at that point." *Id.* at 146-47. For instance, Trumann stated he did not know what happened to Kellems, "but [he] hear[d] voices saying he's okay." *Appellant's Appendix* at 140. Trumann further stated that "maybe he was sick. The devil killed him and he's going to kill me. Then I can be a red devil like him[,]" and "[the devil] took his breath away. He choked him." *Id.* At the conclusion of a hearing on December 10, 2001, the trial court stated: "I have no specific training in psychiatry or psychology . . .[,] but I do have considerable experience and training in evaluating the truthfulness of witnesses who testify in court. And I listened to Mr. Trumann testify and I know he was lying." *Transcript* at 155.

A review of the record reveals the trial court failed to inform Trumann of his appellate rights. Such an omission often results in allowing a belated notice of appeal pursuant to P-C.R. 2(1), even when it is the lone factor considered. *See, e.g.*, *Cruite v. State*, 853 N.E.2d 487, 490 (Ind. Ct. App. 2006) ("[b]ecause . . . the trial court failed to inform [defendant] of his appellate rights, . . . his failure to file a timely notice of appeal was not his fault"), *trans. denied*. The trial court's failure to advise Trumann of his right to a direct appeal, however, was not as harmful as an affirmative misstatement that he did not have the right to a direct appeal. *See Jackson v. State*, 853 N.E.2d 138, 141 (Ind. Ct. App. 2006) ("the trial court not only failed to advise [the defendant] of his right to appeal

his sentence but also expressly advised him that he could not challenge his . . . sentence on direct appeal"). Failing to advise a defendant of his appellate rights, however, does not necessarily dictate the grant of a petition for permission to file a belated notice of appeal, and we have affirmed the denial of such a petition where a trial court did not so inform a defendant. *See Roberts v. State*, 854 N.E.2d 1177 (Ind. Ct. App. 2006) (not an abuse of discretion to deny petition to file a belated appeal even where defendant was not advised of appellate rights), *trans. denied*.

The final factor to be considered in determining if Trumann was without fault is whether he committed an act or omission that contributed to the delay. Although Trumann indicated as early as September 2003 that he was in the process of filing a petition for post-conviction relief, he failed to do so for more than two and one-half years. The record does not suggest the delay is attributable to anything or anyone other than Trumann. *Cf. Roberts v. State*, 854 N.E.2d 1177 (defendant's trial attorney mistakenly believed defendant could not appeal sentence); *Beatty v. State*, 854 N.E.2d 406 (defendant did not know for fourteen years that his attorney had not filed a direct appeal as he had requested); *Cruite v. State*, 853 N.E.2d at 490 ("[t]ime spent by the State Public Defender investigating a claim does not count against a defendant when determining the issue of diligence under P-C.R. 2").

We now turn our attention to the second factor required by P-C.R. 2(1), *viz.*, that the defendant was diligent in requesting permission to file the belated notice of appeal under this rule. We begin with a timeline of the relevant events following Trumann's guilty plea on April 11, 2002. The trial court sentenced Trumann on May 30, 2002. On

September 12, 2003, Trumann sent a handwritten letter to the Elkhart County Clerk requesting a chronological case summary because he was "in the process of filing [his] post-conviction relief petition . . . ." *Appellant's Appendix* at 182. That petition was never filed. On November 9, 2004, our Supreme Court handed down *Collins v. State*, 817 N.E.2d 230 (Ind. 2004), which clarified that a defendant who has pleaded guilty under an "open" plea must challenge a resulting sentence on direct appeal, if at all, and not by way of a petition for post-conviction relief. On February 22, 2006, Trumann, *pro se*, filed a petition for permission to file a belated appeal pursuant to P-C.R. 2(1). Finally, on May 19, 2006, Trumann, by counsel, filed a motion for permission to file a belated notice of appeal, which was granted.

We are mindful that "*Collins* resolved a conflict in earlier Court of Appeals' opinions regarding whether such a defendant could include a sentencing challenge in a P-C.R. 1 petition, . . . and some delay may be attributable to the prior uncertainty in the law rather than the defendant's lack of diligence." *Kling v. State*, 837 N.E.2d 502, 509 (Ind. 2005) (citation omitted). Nevertheless, even "[c]onsidering that [Trumann] might not have been immediately aware of the *Collins* decision," he did not file his petition for leave to file a belated notice of appeal until February 22, 2006, more than fifteen months after the *Collins* decision.

Further, the record reflects that Trumann contemplated filing a post-conviction relief petition as early as September 12, 2003. Whether the "post-conviction relief petition" would have been filed pursuant to P-C.R. 1, which ultimately would have been the incorrect avenue, or P-C.R. 2 is immaterial. Trumann did not need the benefit of the

Supreme Court's decision in *Collins* to know that either a P-C.R. 1 or P-C.R. 2 petition would have been the appropriate method of challenging the propriety of his sentence. *See Perry v. State*, 845 N.E.2d 1093, 1096 (Ind. Ct. App. 2006) ("[w]e should stress that not every motion to file a belated appeal should be automatically granted by trial courts simply because *Collins* has been decided, especially if there is no indication that the defendant had previously made attempts to collaterally attack a sentence imposed following a guilty plea"), *trans. denied*.

The two factors weighing most heavily in favor of granting Trumann's petition are his relatively low level of intelligence and the trial court's failure to inform him of his right to directly appeal his sentence. The import of Trumann's relatively low IQ, however, is significantly negated by: (1) the coherence and number of his filings and correspondences with the trial court following his sentencing; (2) his familiarity with the legal system due to his lengthy criminal history; and (3) the letter indicating he was contemplating filing a post-conviction petition in September 2003. Likewise, the import of the trial court's failure to inform him of his right to directly appeal his sentence is substantially diminished by the length of his delay in filing a P-C.R. 2 petition following *Collins* and his decision to not file a post-conviction petition despite contemplating such a filing as early as September 2003.

Under the facts of this case, Trumann failed to prove by a preponderance of the evidence that he was entitled to file the belated notice of appeal. The trial court, therefore, erred in granting Trumann permission to file the belated notice.

Judgment reversed.

KIRSCH, J., and RILEY, J., concur.